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AUG 22 2000

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION

18 UNITED STATES OF AMERICA and
19 STATE OF CALIFORNIA,

20 Plaintiffs,

21 v.

22 MONTROSE CHEMICAL
CORPORATION
23 OF CALIFORNIA, et al.,

24 Defendants.
25

26 and RELATED COUNTER, CROSS,
27 AND THIRD PARTY ACTIONS.
28

NO. CV 90-3122-R

OPPOSITION OF PLAINTIFFS UNITED
STATES AND STATE OF CALIFORNIA
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON COUNT I
AND PORTIONS OF COUNT II
RELATING TO THE PALOS VERDES
SHELF

Date: September 5, 2000

Time: 10:00 a.m.

Place: Courtroom 8

Judge: Honorable Manuel L. Real

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs the United States of America and the State of California submit this memorandum in opposition to the DDT defendants' Motion for Summary Judgment on Count I and Portion of Count II Relating to the Palos Verdes Shelf (Defs. Mem."'). In their motion, the DDT defendants assert that they are entitled to judgment on the First Claim for Relief of the Third Amended Complaint because the plaintiffs have no precise measure of the damages and because plaintiffs cannot show that the injuries to bald eagles and peregrine falcons were caused by DDT released from the Montrose plant. The DDT defendants next assert that they are entitled to judgment on those portions of Second Claim for Relief because the removal actions which the Environmental Protection Agency is considering would not be proper removal actions should EPA chose to implement them.

In this opposition the plaintiffs will demonstrate several rather straightforward concepts. First, the Court should not have excluded the contingent valuation study, thus depriving the plaintiffs of this measure of interim lost use because that study did provide relevant useful information which could have been used to determine damages in this action.

Second, the testimony of plaintiffs' experts Richard Ambrose and Michael Josselyn provides useful information to the Court as trier of fact on the types of restoration projects which could be implemented to compensate the public for the injury to fish which Montrose's DDT has caused. The defendants can cite to no requirement under CERCLA or elsewhere that the information on such projects be as precise as the DDT defendants seem to assert. Rather, using the *Daubert* standard that the DDT defendants themselves assert, the testimony of Drs. Ambrose and Josselyn easily meets that standard. In addition, the Proffered Testimony of Dr. Ambrose does provide a detailed specification of the damages which injury to the fish has caused the public to incur. In any event, in a case such as this, the Court can award damages where injury is shown even if the amount of damages is uncertain.

Third, the DDT defendants assert that plaintiffs cannot prove that Montrose's DDT was the sole or substantially contributing cause of the injuries which the bald eagles and peregrine falcons have suffered. However, the evidence of Montrose's massive discharge of DDT to the sewer system

1 over a period of nearly 30 years, the evidence of the still-existing reservoir of DDT in the sediments
2 offshore Palos Verdes, and the evidence of plaintiffs' experts which links the injuries in the birds
3 to the Southern California Bight is more than sufficient to establish causation here.¹ Moreover, to
4 the extent that the DDT defendants are relying on the supposedly "uncontradicted evidence" of their
5 experts that the DDT which caused the injuries to the birds came from agricultural runoff, that
6 evidence is in fact contradicted by plaintiffs. Thus, there is no basis for the Court to enter judgment
7 on the First Claim for Relief.

8 Finally, the DDT defendants' assert that EPA's institutional control program and pilot
9 capping study both violate CERCLA and have no basis in the record. However, even if the DDT
10 defendants were correct, this Court could not enter judgment for the defendants on the parts of
11 Second Claim for Relief which relate to the Palos Verdes shelf for the simple reason that the
12 proposed institutional control program and the pilot capping study are not a part of EPA's claim in
13 this action. What the DDT defendants seek from this Court is nothing more than an advisory
14 opinion. A request for such relief does not provide a basis or the authority for granting a motion for
15 summary judgment.

16 PROCEDURAL BACKGROUND

17 Plaintiffs largely agree with the procedural background which the defendants have provided
18 for the natural resource damages claim. Prior to several of the Court's recent rulings, plaintiffs did
19 assert that at trial they would attempt to recover \$357 million in natural resource damages at trial.
20 Moreover, the breakdown of that damage claim which the defendants present from prior pleadings
21 is essentially accurate.²

22
23 ¹ In their motion, the DDT defendants do not ask the Court to determine that the DDT on
24 the Palos Verdes shelf was not released by Montrose. Rather, they ask the Court to find that the
25 DDT on the Palos Verdes shelf could not have caused the injuries to the bald eagles and peregrine
falcons.

26 ² However, in the three years since the interrogatory responses were issued, plaintiffs have
27 added to and modified certain elements of the claim. For example, plaintiffs retained an expert to
28 perform a resource equivalency analysis to scale artificial reefs for both restoration projects and for
compensation for lost use. See Declaration of John A. Saurenman in Support of Opposition of
Plaintiffs United States And State of California to Defendants' Motion For Summary Judgment on

1 However, plaintiffs do not agree with manner in which the defendants characterize the EPA
2 removal actions. It is not accurate to claim, as these defendants do, that in assuming responsibility
3 for responding to the contaminated sediments on the Palos Verdes shelf, EPA was attempting to
4 shield the Trustees' restoration case from a trial or that EPA was acting as the puppet of the United
5 States Department of Justice. In fact, EPA was properly and appropriately exercising its jurisdiction
6 to address contamination, and even these defendants conceded to the Court of Appeal for the District
7 of Columbia that there was nothing objectionable in EPA undertaking its investigation. See
8 *Montrose Chemical Corporation v. EPA*, 132 F.3d 90, 94 (D.C. Cir. 1998).

9 Plaintiffs do agree with the defendants that EPA has proposed a program of institutional
10 controls in order to further protect the public from consumption of fish contaminated by the DDT
11 offshore Palos Verdes, and EPA has estimated the cost of this proposal. However, EPA has not
12 selected this action. Also, EPA has commenced its pilot study to investigate the feasibility of
13 capping a small portion of the Palos Verdes shelf. But plaintiffs do not agree that either of these
14 activities is a part of this case. As we have stated innumerable times, plaintiffs, on behalf of EPA
15 and DTSC, are only seeking in this case to establish the liability of the defendants under Section 107
16 of CERCLA, *i.e.*, a declaratory judgment with respect to future costs and recovery of past costs. The
17 costs currently being incurred by EPA to conduct its pilot capping study are not part of the past cost
18 claim which plaintiffs assert here. Further, plaintiffs have not asserted a past cost claim for a cleanup
19 action – institutional controls – which EPA has not even selected as a response action.

20 ARGUMENT

21 I. THERE IS NO BASIS FOR THE COURT TO ENTER JUDGMENT ON THE 22 FIRST CLAIM FOR RELIEF.

23 A. The Contingent Valuation Study Should Not Have Been Excluded.

24 Plaintiffs agree with the defendants that the Court granted the defendants' motion to exclude

25
26 Count I and Portions of Count II Relating to The Palos Verdes Shelf ("Saurenman Dec."), Exh. 5
27 (Proffered Testimony of Richard F. Ambrose). In addition, plaintiffs have estimated lost use for bald
28 eagles and peregrine falcons as measured by the contingent valuation survey. See Saurenman Dec.,
Exh. 2 (Proffered Testimony of Richard T. Carson).

1 the plaintiffs' contingent valuation study, and with its exclusion, that measure of interim lost use was
2 also excluded. Plaintiffs disagree with the defendants on several points. First, the defendants'
3 motion was not based on the governments' science experts "admitt[ing] that these species were
4 reproducing as effectively at the Palos Verdes Shelf as elsewhere." Defs. Mem. at 8. In fact, these
5 species are not reproducing as effectively as elsewhere. For example, the bald eagles which were
6 introduced by humans to Catalina Island still cannot reproduce successfully on their own because
7 of DDT poisoning. See Saurenman Dec., Exh. 1 (Direct Testimony of David Garcelon ("Garcelon
8 Testimony")). The defendants' motion was based on their assertion that the contingent valuation
9 study was not relevant because it did not measure the value of the interim lost use of the exact group
10 of species for which plaintiffs can prove injury, e.g., bald eagles and peregrine falcons.

11 Second, although the injury scenario in the main contingent valuation survey and the scope
12 survey did not exactly reproduce the injuries involved herein, the contingent valuation survey still
13 provided relevant information to the Court on the value of the public's interim lost use. As Dr.
14 Richard Carson has explained in his proffered testimony, the information in the contingent valuation
15 report can be used "to derive an estimate of approximately \$160 million as the prospective interim
16 lost use value for bald eagles and peregrine falcons injured from DDT and PCB contamination from
17 the Palos Verdes shelf." Saurenman Dec., Exh. 2 (Proffered Testimony of Richard T. Carson).

18 Because the contingent valuation study did provide relevant information which would have
19 assisted the Court in determining the damage award, it should not have been excluded.

20 B. The Testimony of Dr. Ambrose and of Dr. Josselyn is Relevant and Useful.

21 The defendants next assert that the testimonies of Drs. Ambrose and Josselyn should be
22 excluded because neither of these experts provided sufficient guidance to the Court. The defendants
23 cite to no authority that supports their position. There is nothing in CERCLA which requires that
24 the plaintiffs provide detailed information on the location, size or design of an artificial reef or
25 wetlands restoration project in order to recover damages.

26 1. The Testimonies of Drs. Ambrose and Josselyn

27 In his written testimony, Dr. Richard Ambrose reviews the history of artificial reefs generally
28

1 and offshore California.³ He notes that resources produced on an artificial reef are used to balance
2 resources lost due to human activities. He also notes that there is growing evidence that artificial
3 reefs increase fish production and thus would provide replacement resources for the public. Dr.
4 Ambrose also states as follows:

5 Many fish living on sand-bottom habitats, including white croaker and Dover sole, feed on
6 worms and other invertebrates living in or on the sand. In sediment contaminated with DDT,
7 such as the Palos Verdes shelf, these prey are also contaminated, and fish can have DDT
8 concentrations in their tissues which exceed federal or state standards for consumption. The
9 occurrence of contaminated fish means fewer fishing opportunities in an area. An artificial
10 reef can provide replacement fishing opportunities by providing access to "clean" fish, that
11 is fish without elevated DDT concentrations in their tissues. Fish occurring on artificial reefs
12 built away from the contaminated sediments on the Palos Verdes Shelf would be cleaner than
13 the fish occurring on the shelf. Therefore, artificial reefs could provide recreational anglers
14 with alternative fishing opportunities.

15 Saurenman Dec., Exh. 3 (Direct Testimony of Richard F. Ambrose at 8-9).

16 Dr. Ambrose then reviewed techniques for construction of artificial reefs and the associated
17 costs. He determined that the average cost of constructing a number of artificial reefs in the region
18 was \$170,000 per acre. *Id.* at 10. He also determined that promising area for artificial reefs here
19 included Paradise Cove near Point Dume in north Santa Monica Bay and south of Dana Point near
20 San Clemente. *Id.* at 6.

21 Dr. Josselyn engaged in a similar exercise in his written testimony.⁴ In summarizing his
22

23 ³ Dr. Ambrose is the current director of the Environmental Science and Engineering Program
24 and an associate professor in the Department of Environmental Health Sciences at UCLA. He has
25 conducted diving research in Southern California reef ecosystems for 25 years and has studies
artificial reefs since 1985.

26 ⁴ Dr. Josselyn presently is the President of Wetlands Research Associates, Inc. and is also
27 Professor Emeritus at San Francisco State University where he was a Professor of Biology from
28 1978 until 2000. He has served as a consultant in wetland restoration since 1982 and has prepared
wetland restoration plans for many Southern California wetlands.

1 conclusions, Dr. Josselyn stated as follows:

2 The restoration of coastal wetlands can increase food production, provide fish habitat, and
3 improve water quality for nearshore environments. Restoration of these wetlands is a
4 potential mitigation measure for adverse impacts associated with habitat loss in nearshore
5 waters. Using a set of criteria developed to compare the potential benefits associated with
6 restored coastal wetlands, I determined which currently degraded coastal wetlands could be
7 restored to provide the most benefit to nearshore environments. I determined there are at
8 least 11 sites totaling 3500 acres in southern California that once restored will have a high
9 probability of benefitting nearshore environments. The restoration of these areas was
10 determined to be feasible and to have a high degree of success. I also determined that the
11 estimated range in cost for the restoration of these sites was between \$39,000 to
12 \$222,000/acre.

13 Saurenman Dec., Exh. 4 (Testimony of Michael Josselyn).

14 Finally, on April 17, 2000, plaintiffs produced to the defendants an amended report from Dr.
15 Ambrose. This report supplemented his early work by providing an estimate of the size of the
16 damages which resulted from contaminated fish found offshore the Palos Verdes peninsula. At the
17 time of Dr. Ambrose's deposition in late 1999, he disclosed that he was conducting this
18 supplemental work, and the defendants questioned him extensively about it. Notwithstanding this
19 early disclosure of supplemental work in accordance with the discovery orders then governing expert
20 discovery, the defendants moved to exclude Dr. Ambrose's amended report on the basis that
21 plaintiffs did not mention it at the February 14, 2000 status conference. On June 5, 2000, the Court
22 granted the defendants' motion and excluded Dr. Ambrose's amended report along with a number
23 of other reports. Plaintiffs have filed with the Court an offer of proof detailing the testimony Dr.
24 Ambrose would have provided if he were allowed to testify about his supplemental work.
25 Saurenman Dec., Exh. 5 (Proffer of Direct Testimony of Richard F. Ambrose).

26 In his proffered testimony, Dr. Ambrose describes how he quantified the size of the injury
27 reflected by the contaminated fish which exceed the FDA action level and the State trigger level and
28 determined the amount of clean fish that would be needed to provide both primary and compensatory

1 restoration for the public. Dr. Ambrose also quantified the benefits which an artificial reef would
2 provide. Dr. Ambrose then estimated the size of reefs that would be required for primary and
3 compensatory restoration and the costs associated with those reefs. For primary and compensatory
4 restoration combined, Dr. Ambrose estimated that reefs of between about 583 and 627 acres would
5 have to be built at a combined cost of between about \$99 million and \$130 million. Dr. Ambrose
6 did not recommend specific locations for the artificial reefs but noted that the most likely locations
7 were Santa Monica Bay and down coast of Long Beach. He further noted that the specific reef
8 design would be dependent on the final locations chosen for the reefs. Thus, Dr. Ambrose provides
9 a quite detailed and specific calculation of the damages to which the public is entitled.⁵

10 2. The Testimony of Drs. Ambrose and Josselyn Provides Sufficient Certainty
11 to Calculate Damages.

12 The crux of the defendants' argument is that the testimony of Drs. Ambrose and Josselyn
13 provides insufficient guidance to the Court to be admissible. However, they cite to no requirement
14 in either CERCLA or in the cases that mandates the level of specificity that they desire.

15 The defendants rely primarily on *Lindy Pen Company, Inc., v. BIC Pen Corporation*, 982
16 F.2d 1400 (9th Cir. 1993). *Lindy Pen* is inapposite here. Most importantly, *Lindy Pen* arose in the
17 context of the Lanham Trade-Mark Act which imposes specific requirements for establishing
18 damages. See 15 U.S.C. § 1117(a). CERCLA does not require any specific level of proof in order
19 to establish damages.

20 Moreover, the law is clear that damages do not become unrecoverable simply because they
21 cannot be calculated with absolute precision. What a plaintiff must show is a reasonable basis for
22 calculation of damages. See *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359,
23 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927); see also *Samaritan Inns, Inc. v. District of Columbia*,
24 114 F.3d 1227, 1235 (D.C. Cir. 1997) ("Although a court will not permit a plaintiff to recover
25 damages based on mere speculation or guess, the fact that an estimate is uncertain or inexact will not
26

27 ⁵ Plaintiffs again note that the Court erred in excluding the April 2000 report of Dr. Ambrose
28 as well as the other April 2000 reports which plaintiffs served on the defendants. In the
circumstances which existed at the time, exclusion was far too harsh a sanction to impose.

1 defeat recovery, once the fact of injury is shown.”) (internal citations omitted).⁶ As the Ninth Circuit
2 stated in *Holland Livestock Ranch v. United States*, 655 F.2d 1002, 1006 (9th Cir. 1981), “Once
3 injury has been proven, the fact that damages are not susceptible to precise measurement does not
4 preclude recovery.”

5 Here, plaintiffs have already established the fact of injury to the fishery resources of the Palos
6 Verdes shelf, and the Court has entered summary judgment on that issue. The only uncertainty is
7 in the calculation of the monetary damages. The Court possesses considerable discretion to calculate
8 those damages. *Marsu, B.V. v. Walt Disney Company*, 185 F.3d 932, 938 (9th Cir. 1999) (“It is
9 within the sound discretion of the trier of fact to select the formula most appropriate to compensate
10 the injured party.”); see also *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471, 483 (D. Me. 1987)
11 (“Once damage has been established in a nonjury trial, the trial judge has considerable discretion in
12 fixing the amount of damages.”) (citing *Morales v. Benitez de Rexach*, 541 F.2d 882, 886 (1st Cir.
13 1976)) *aff’d in part and vacated in part on other grounds*, 845 F.2d 347 (1st Cir. 1988).

14 Both Dr. Ambrose and Dr. Josselyn provide a reasonable basis for calculating damages
15 because they provide estimates of the cost per acre for constructing artificial reefs and restoring
16 wetlands. And in his proffered testimony, Dr. Ambrose provides an even more reasonable basis for
17 estimating the level of damages. Even though it is difficult to calculate the damages in such a
18 situation, such a decision is within the discretion of the finder of fact. *Jenkins v. McLean Hotels,*
19 *Inc.*, 859 F.2d 598, 600 (8th Cir. 1988) (“Awards for pain and suffering are highly subjective and the
20 assessment of damages is within the sound discretion of the jury. . . , especially when the jury must
21 determine how to compensate an individual for an injury not easily calculable in economic terms.”)

22
23 ⁶ In fact, the *Lindy Pen* court referred to the treatise Dan B. Dobbs, *Remedies* (1973).
24 Therein, the author noted that damages are routinely awarded in situations where they are impossible
25 to determine, e.g., wrongful death cases and personal injury cases where future earning are uncertain,
26 and patent or trademark infringement cases. *Id.* at § 3.3, at 151-52. As Mr. Dobbs stated, “The
27 certainty causes no problem here, because the fact of damage is shown and only the amount is
28 uncertain. *Id.*; see also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564
(1931) (“To deny the injured party the right to recover any actual damages in such cases, because
they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by,
and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and
cannot be the law. . . .”)

1 3. The Testimony of Drs. Ambrose and Josselyn is Admissible Under *Daubert*.

2 Both Dr. Ambrose and Dr. Josselyn easily meet the standards which the Supreme Court set
3 in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The defendants state⁶ that the
4 testimony must be “helpful to the trier of fact – that is, related to the facts of the case and founded
5 upon reliable science or other expertise.” Defs. Mem. at 13. Although they allege that neither
6 requirement is met here, the defendants do not even attempt to show that the opinions⁷ of Drs.
7 Ambrose and Josselyn are not founded upon “reliable science or other expertise.” Instead the
8 defendants argue only that those opinions are not related to the facts of the case. Again, the
9 defendants are wrong.

10 First, the Court has already determined that the fishery on the Palos Verdes shelf has suffered
11 injury because the level of DDT contamination exceeds the FDA action level and because the State
12 has taken steps to limit or stop consumption of some species of fish causing lost opportunities for
13 fishing. Order Granting Plaintiffs’ Motion for Partial Summary Judgment on the Issue of Injury to
14 Natural Resources, June 6, 2000.

15 Second, as Dr. Ambrose notes, “Artificial reefs are well known for having large
16 concentrations of fish, including sportfish around them,” (Ambrose Testimony at 6-7), and that
17 “artificial reefs provide recreational anglers with alternative fishing opportunities (*id.*, at 8-9). He
18 also concludes that artificial reefs “would result in increased local fish production and . . . would
19 provide increased fishing opportunities.” *Id.* at 9. This testimony is directly relevant to the issues
20 in this case, i.e., what needs to be done to restore the lost opportunities for fishing caused by the
21 contaminated fisheries and the costs associated with restoring those opportunities.⁷

22 Nor does Defendants’ assertion that Dr. Ambrose’s 1994 work is “preliminary” carry the day.
23 Dr. Ambrose testified, “I think that a decision about whether constructed reefs would be an
24 appropriate replacement alternative could be made based on this report, but that before you actually
25 built the reef you’d want to do more studies for sure.” Deposition of Ambrose (Defs. Exh. 5) at 21

26
27
28 ⁷ Of course, Dr. Ambrose’s proffered testimony is even more directly related to the issues
because it provides an express quantification of damages.

1 Thus, the Court can decide that constructed reefs would be an appropriate replacement alternative
2 based on the Ambrose 1994 report alone. The mere fact the Trustees would need to obtain a more
3 detailed engineering plan prior to construction does not require exclusion of Dr. Ambrose's work.

4 Third, Dr. Josselyn determined that restored coastal wetlands have a number of benefits
5 including the following: 1) Supply of organic matter and plant food materials to the coastal zone;
6 2) High rates of fish production that provide food for larger fish within the near shore environment;
7 3) Vital rearing habitat for young fishes, especially for California halibut; and 4) Improved diversity
8 of aquatic habitats such as mudflats and shallow tidal channels that support bottom dwelling
9 organisms such as crabs, shrimps, and clams. Josselyn Testimony at 4. As with Dr. Ambrose's
10 testimony, Dr. Josselyn's testimony relates directly to improving fishing resources or providing
11 substitutes for those fishing resources, e.g., habitats for shellfish. This testimony is directly related
12 to this case because it relates to restoring fishery resources and the costs associated with restoring
13 those resources.

14 In sum, although the testimony of Drs. Ambrose and Josselyn is not as specific and detailed
15 as the defendants would like, it is indeed helpful to the Court in determining what must be done to
16 correct the injury to the fishery resources of the Palos Verdes shelf and in determining the costs
17 associated with correcting that injury. Thus, under the defendants' own characterization of *Daubert*,
18 this testimony is admissible. Indeed, there is a substantial relationship between the opinions of Drs.
19 Ambrose and Josselyn and the facts of this case, and thus their opinions are admissible.⁸

20 C. Plaintiffs Can Establish that DDT on the Palos Verdes Shelf Caused Injuries to Birds.

21 Defendants argue that "the government cannot show that the DDT in the birds came from the
22 DDT in the sediments at the Palos Verdes Shelf." Defs. Mem. at 14. They base this argument on
23 the assertion that the plaintiffs cannot prove that the contaminated sediments of the Palos Verdes
24 shelf "caused" the injury and the additional assertion that the injury was caused by DDT in
25 agricultural run off. In making this argument, the defendants then suggest that plaintiffs are confined

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27 ⁸ Cf. *In re TMI Litig. Cases Consolidated II*, 911 F.Supp. 775, 798 (M.D. Pa. 1996) (not a
28 sufficient fit if the models do not bear "any meaningful relationship to the actual topography of the
TMI area or to the primary data.")

1 to a single witness, a "modeler," and contend that his testimony is insufficient to show causation.
2 Defs. Mem. at 14. The defendants also allege that the evidence of their experts on agricultural run
3 off is "uncontradicted." The defendants' view of this case is incorrect. The plaintiffs have multiple
4 witnesses who will testify that Montrose's DDT is a substantially contributing cause of the injuries
5 to eagles and peregrine falcons regardless of the path by which that DDT made its way to the ocean.
6 Moreover, the evidence of the defendants' experts regarding agricultural run off is not
7 contradicted.

8 1. The Defendants Seek Summary Judgment Only on the Causation Issue.

9 At the outset, it is important to understand what the defendants are not claiming. First, they
10 are not asserting that the bald eagles and peregrine falcons have not been injured by DDT. Indeed,
11 their argument appears to concede such injuries. Rather, they are arguing that someone else's DDT
12 did the damage. Second, the defendants do not ask the Court for a determination that the DDT on
13 the Palos Verdes shelf did not come from the Montrose DDT manufacturing operation. Thus, the
14 only issue here is whether there is sufficient evidence to create a triable issue of fact on whether the
15 DDT-induced injuries to the eagles and falcons resulted from the DDT found on the Palos Verdes
16 shelf (or otherwise released into the environment by Montrose). As we show below, there is more
17 than sufficient evidence linking the eagle and falcon injuries both to the Montrose DDT and to the
18 sediments of the Palos Verdes shelf. Therefore, summary judgment must be denied.

19 The evidence will show that Montrose arranged for the dumping of hundreds of tons of DDT
20 into the open ocean near Catalina Island, and released an additional hundreds to thousands of tons
21 of DDT in the waste stream which Montrose discharged to the public sewer system and then to the
22 ocean. Plaintiffs' evidence shows that more than a 100 metric tons of that DDT remains on the Palos
23 Verdes shelf. Saurenman Dec., Exh. 14 (Testimony of Homa J. Lee at 4). That DDT poses a
24 concentrated, ongoing threat to the marine environment. However, the substantial balance of
25 Montrose's waste DDT is dispersed throughout the marine ecosystem of the Southern California
26 Bight – the very source that plaintiffs' modeler, Dr. John Connolly, holds responsible for the
27 contamination of the birds.

1 2. Plaintiffs have more than sufficient credible evidence of causation.

2 Plaintiffs will present fact and expert witnesses, as well as documentary evidence, to establish
3 a link between the Montrose waste DDT in the Southern California Bight ("SCB"), including that
4 which remains on the Palos Verdes shelf, and the birds at issue.⁹ In summary, this evidence will
5 show the vast discharges of DDT to the environment from the Montrose DDT operation. That
6 evidence will also show the large amount of DDT in the Palos Verdes shelf sediments and that the
7 DDT concentrations decline as one moves away from the Palos Verdes shelf. Thus, among other
8 evidence, plaintiffs will show the following:

- 9 • Between 1947 and 1961, Montrose hired a disposal company to dump directly into the ocean
10 within a few miles of Santa Catalina Island acid wastes containing approximately 350 to 700
11 metric tons of DDT. Saurenman Dec., Exh. 8 (Chartrand Report at 15).
- 12 • In addition, between 1954 and 1971 Montrose discharged another estimated 1800 metric tons
13 into the ocean through the public sewer system. *Id.* at 18. Approximately 100 tons of that
14 settled into the sediments of the Palos Verdes shelf. Saurenman Dec., Exh. 14 (Lee
15 Testimony at 4).
- 16 • Local currents dispersed the balance of Montrose's DDT in a generally northerly direction.

18 ⁹ In addition, plaintiffs have proffered the testimony of Robert W. Risebrough, Walter
19 Jarman, and Michael Fry. Saurenman Dec., Exhs. 7, 8 and 15. These witnesses have important
20 evidence to offer on the factual matters at issue in this motion. Thus, the testimony of Dr.
21 Risebrough – one of the world's preeminent authorities regarding DDT and its effects on birds –
22 is pertinent to issues concerning the dispersal and transport of Montrose DDT throughout the SCB,
23 whether other uses of DDT, particularly historical agricultural residues, are a significant factor in
24 the bird injury, and the comparison of the levels of contamination in the SCB to other areas of the
25 world. In addition, Dr. Fry provides data comparing levels of DDT contamination in various species
26 present in the SCB and elsewhere. He summarizes his opinion at page 18, by stating "... the
27 Southern California Bight remains the most contaminated area in the United States for bio-available
28 DDT residues that contaminate organisms at all levels and coastal ecosystem. Agricultural runoff
ceased to be a source of bio-available DDT within a few years following the ban on agricultural uses
of DDT." Dr. Jarman's proffered testimony provides important information concerning the relative
concentrations of DDE in peregrines, and the rate of their recovery, by region. However, even
without the benefit of such relevant testimony, plaintiffs' remaining witnesses and other admissible
evidence clearly demonstrate that there are material issues of fact in dispute concerning the cause
of the bird injuries.

1 That which was originally deposited in the sediments of the Palos Verdes shelf continues to
2 be dispersed through the natural forces. Saurenman Dec., Exh. 9 (Testimony of John P.
3 Connolly ("Connolly testimony") at 19.¹⁰

4 That the SCB has unusually elevated levels of DDT in its media and wildlife has been
5 reported by numerous scientists, some of whom have provided testimony that will be offered at trial
6 and who are relied on herein. The levels of DDT contamination in the SCB far exceed other
7 locations on the west coast, other areas in this country and throughout the world even where
8 substantial amounts of DDT was and, in some instances, continues to be used. For example, in his
9 direct testimony concerning peregrine falcons, Grainger Hunt states, "DDE concentrations were
10 extremely high in the peregrine eggs we collected on the Channel Islands in 1992 and 1993, much
11 higher than in other regions of the west where DDE levels in eggs have dropped substantially." Hunt
12 Testimony at 3.

13 David Garcelon, an expert on bald eagles, in explaining how the prey of bald eagles provides
14 a pathway from the DDT in lower organisms of the SCB marine environment to the eagles, reports
15 that, "... DDE levels collected from western gull colonies on the Channel Islands are approximately
16 10 times higher than concentrations found in gull colonies in the San Francisco area and along
17 coastal Oregon." Garcelon testimony at 14. Mr. Garcelon also states, "The eggs from Catalina are
18 currently some of the most contaminated in the entire geographic range of the species, and contain
19 some of the highest DDE values ever reported for bald eagles." *Id.* at 22. He also notes that on
20 average, "... Catalina eagle eggs are from 5 to over 50 times more contaminated with DDE than at
21
22

23 ¹⁰ The commercial pesticide product, DDT, degrades into a metabolite known as DDE.
24 DDE which is present in the marine sediments and in the ocean waters is ingested and absorbed into
25 the tissues of marine organisms. Bald eagles and peregrine falcons are at the top of the foodweb
26 and they biomagnify DDE in their tissues. Saurenman Dec., Exh. 17 (Testimony of Robert Mesta
27 at 6-7, 8.) DDE in the tissues of bald eagles and peregrine falcons causes thinning and other
28 abnormalities in their eggshells. The prey of bald eagles residing on Catalina includes fish, gulls and
other birds, and dead sea lions and other dead marine mammals. *Id.* at 9. The prey of peregrine
falcons residing on the Channel Islands includes gulls, auklets, and other birds. Saurenman Dec.,
Exh. 12 (Testimony of Kiff) at 20), Exh. 10 (Testimony of W. Grainger Hunt at 8).

1 other locations along the Pacific Coast. *Id.* at 23.¹¹

2 Similarly, Lloyd Kiff states in his testimony on peregrine falcons that population declines
3 were reported all over the world, but "[b]y 1988, the species had recovered to historic or near historic
4 levels in most regions: by now, recovery is complete in every part of the world except for portions
5 of southern California and the Channel Islands." Saurenman Dec., Exh. 12 (Testimony of Lloyd Kiff
6 at 20-21).¹² Thus, it is clear that there is severe DDT contamination of eagles and falcons.

7 There is compelling data showing that the levels of DDT contamination decline both
8 southward and northward from the SCB, in a wide variety of marine species. This phenomenon can
9 only be explained by an unusually large source of DDT in the SCB, *i.e.*, the Palos Verdes shelf. For
10 example, Franklin Gress testifies regarding brown pelicans and double-crested cormorants, "The
11 DDE residues from these studies showed a pronounced north-south concentration gradient: levels
12 were much higher in the SCB colonies of both species than in colonies further south along the Baja
13 California coast or in the Gulf of California. . . ." Saurenman Dec., Exh. 13 (Testimony of Franklin
14 Gress at 8). He further testifies that this phenomenon has occurred in other species, as well.¹³

15 Dr. Connolly also describes a more localized decline, "Concentrations in fish caught
16 elsewhere in the Bight depend on proximity to the Shelf, generally being higher the closer they are

18 ¹¹ John Calambokidis, a marine mammal expert who is a witness for the State in this matter,
19 states, "Studies of contaminant concentrations in several marine mammal species from the Southern
20 California Bight have revealed extremely high concentrations of DDT compounds compared to
21 levels reported elsewhere." Saurenman Dec., Exh. 11 (Testimony of John Calambokidis at 3-4).

22 ¹² Kiff compared egg shell thicknesses of eggs of 10 species of seabirds from the Channel
23 Islands to those of the same or closely related species from other Pacific Coast locations and found
24 in most cases that the Channel Island birds were suffering much more severe thinning. Kiff
25 testimony at 18.

26 ¹³ Studies of other marine organisms (e.g., mussels, sand crabs, northern anchovies
27 and other fish species) have also shown a north-south concentration decline, showing highest levels
28 of DDE in southern California waters, with levels declining in relation to increased distances from
the southern California coast (citations omitted). In each of these studies, DDE residues were
highest off the southern California coast and decreased north and/or southward. In examining the
data from these studies, many scientists concluded that a significant source of DDE input must be
present somewhere off the coast of southern California. *Id.* at 9.

1 to the Shelf. The same pattern is shown in the graph of DDE in White croaker and Dover sole in our
2 1997 expert report. . . .” Connolly testimony at 23.

3 In addition, temporal evidence supports the conclusion that Montrose’s waste DDT has
4 injured the birds. With the cessation of Montrose’s discharge of its effluent into the SCB in 1970,
5 DDT levels in the media and in wildlife began to decline and less sensitive species began to recover.
6 Gress testifies on this issue.

7 With decreased input of DDT into the SCB marine environment beginning in 1970, Brown
8 Pelican reproduction in SCB began improving by 1974; both breeding effort and productivity
9 improved substantially as mean eggshell thickness gradually increased and DDE levels, as
10 observed in the pelican population, declined. A similar increase in breeding success was also
11 observed in Double-crested Cormorants nesting on Anacapa Island, but did not begin until
12 about 1978.

13 Gress Testimony at 4, 11.

14 That it was, and continues to be, Montrose’s waste DDT which accounts for the continued
15 elevated levels of DDT in the SCB, and which is the cause of the bird injuries is further confirmed
16 by the fact that in other parts of the country where agricultural use of DDT was widespread,
17 peregrines and bald eagles are recovering.

18 3. There is ample evidence which contradicts the defendants’ theory relating to
19 agricultural run off.

20 Defendants – searching for some other explanation for the remarkably high levels of DDT
21 in the SCB marine environment – would have the Court believe that Los Angeles area farmers
22 applied DDT in such disproportionately large amounts that it was they who injured the birds. Defs.
23 Mem. at 15. This is a preposterous notion, as evidence to be presented by plaintiffs will demonstrate.
24 As Grainger Hunt notes, “. . . the recovery of peregrines in other parts of the country where
25 agricultural DDT was present in large quantities, support the conclusion that a unique source of DDT
26 contamination exists in southern California.” Hunt Testimony at 4.

27 Dr. Connolly investigated whether residual DDE from agricultural and other historic uses
28 could account for the elevated levels of DDE in the SCB. While finding that these sources

1 contributed some DDE to the SCB, he concluded that it was minor stating, "Tributary watersheds
2 are also sources of DDE to the open coastal waters of the Bight, but the available evidence does not
3 suggest more than a local impact on DDE levels in the open coastal waters." Connolly Testimony
4 at 17. Dr. Connolly also notes that, "... while elevated DDE levels are found in enclosed water
5 bodies in the Southern California Bight, these sources are in general not important enough to cause
6 visible plumes in DDE levels in the sediments, waters and fish of the open coastal waters." Connolly
7 Testimony at 22.¹⁴

8 Moreover, in attempting to support their position, the defendants completely mischaracterize
9 the work of Dr. Connolly. The deposition testimony they cite does not relate to a "food chain model"
10 for the bald eagles and peregrines, and Dr. Connolly certainly did not "admit[]" in his deposition
11 testimony that he could not testify that the Palos Verdes Shelf in particular has been the source of
12 DDT to the birds." Def. Brief at 15-16. In fact, Dr. Connolly concludes that "[a] pathway exists
13 between the DDE contamination in the sediments on the Palos Verdes shelf and the bald eagles
14 nesting on Catalina Island." Connolly Testimony at 6.

15 In his testimony, Dr. Connolly explains why the Palos Verdes shelf sediments are a
16 significant source of DDT to the bald eagles:

17 The fish DDE levels on the Palos Verdes Shelf are much higher than the estimated average
18 level in sea lion prey (reference omitted) indicating that infrequent foraging in this area
19 would be sufficient to achieve the sea lion DDE levels. . . . Based on the observed diet
20 approximately 60% of the DDE dose to these bald eagles originated in the sea lion carcasses,
21 even though on average sea lion carcasses comprised about 3 percent of the diet (citation
22 omitted). This equates to approximately one meal each month of sea lion carcass tissue.

23
24 ¹⁴ Even when the agricultural use of DDT was recent and its effects still substantial, it was
25 still relatively small by comparison to the Montrose discharges to the SCB. In the late 1960s when
26 the annual DDT contribution to the ocean from the Montrose effluent was estimated to be about 100
27 tons, that was "... about 10 times the amount of pesticides estimated to be carried into the Gulf of
28 Mexico each year by the Mississippi River." Saurenman Dec., Exh. 17 (MacGregor, J.S., 1974,
"Changes in the Amount and Proportions of DDT and its Metabolites, DDE and DDD, in the
Marine Environment of Southern California, 1949-72," 72 *Fishery Bulletin* 275, 278); citation
omitted.

1 Relatively few meals of sea lion carcasses are required to provide the relatively large DDE
2 dose to the eagles, because some sea lion carcasses contained very high levels of DDE: for
3 example, 1600 ppm was measured in the fat of one carcass upon which eagles were observed
4 feeding.

5 *Id.* at 28, 29-30.

6 A related pathway of the DDE from the Palos Verdes shelf sediments to the peregrine falcons
7 can be established by the plaintiffs' witnesses as well. The elevated DDE levels in sea lions to which
8 Dr. Connolly refers in his testimony were from blubber samples taken of sea lions at San Miguel
9 Island. The peregrines suffering from elevated levels of DDE reside on the Northern Channel Islands
10 and are proximate to these contaminated sea lions. Mesta Testimony at 8. Gulls, one of the primary
11 prey items of peregrines, have been observed to feed on dead California sea lions. Hunt Testimony
12 at 4.

13 Defendants' characterization of the work of their own experts is similarly misleading, and that
14 work is certainly not "uncontradicted" as claimed by defendants. In fact, plaintiffs intend to file
15 motions *in limine* to exclude most of this work because it does not meet the standards set forth in
16 *Daubert*.¹⁵ This opposition memorandum is not the appropriate place to set forth all of plaintiffs'
17 challenges to defendants' purported expert testimony, because plaintiffs have demonstrated above
18 with affirmative evidence that there are disputed factual issues which preclude summary judgment.
19 But it is significant that defendants even distort the work of their own experts when it suits their
20 purpose. Defendants in their brief assert that "[c]lear evidence of the source of the DDT also comes
21

22 ¹⁵ In some cases, plaintiffs will also be seeking to strike testimony because the individual
23 testifying did not conduct the study at issue and has no familiarity with it. For example, Dr. Giesy
24 testified that he was too busy to conduct a study of the ratio of DDT to PCB, and that Dr. Hansen
25 was asked to do the work. Saurenman Dec., Exh. 21 (Giesy depo, vol. 5. at 20-21). Dr. Giesy
26 testified further that "the next I had heard was that Dr. Knezovich had been asked to actually go to
27 the literature and reports and pull this information out and make those calculations." *Id.* at 28. Dr.
28 Giesy further testified that he did not know why Dr. Knezovich chose the particular data to analyze,
and that he had no input into Dr. Knezovich's selection of the data. *Id.* at 48, 74-75. Dr. Giesy
relied totally on Dr. Knezovich's report to prepare the section of the Giesy report cited by
defendants, *Id.* at 33-34, yet he knew nothing of Dr. Knezovich's qualifications to conduct this
analysis. Saurenman Dec., Exh. 20 (Giesy depo vol. 1 at 108-109).

1 from the ratio of DDT to PCBs in birds - known as the chemical "fingerprint." Defs. Mem. at 16.
2 What defendants do not tell the Court is that this statement is contradicted by the very experts whose
3 work is cited as support for this statement. For example, with respect to this technique, Dr. Hansen,
4 one of the defendants' witnesses, testified as follows:

5 Q. Can you state what, using the DDT-PCB ratio, what proportion of the contamination in
6 an organism is caused by a particular source?

7 A. No. All you can do is -- no, you can't. All you can do is say that there are certain areas
8 which, from it's unlikely that the material came. You can exclude areas, but you can never
9 prove which of the areas is the source.

10 Saurenman Dec., Exh. 18 (Hansen depo. at 519). Therefore, the defendants' fingerprinting technique
11 cannot be used to prove that it is the DDT from agricultural run off that is the cause of reproductive
12 injury seen in the birds of the SCB.

13 Even if the ratio technique discussed by defendants were a valid scientific approach (which
14 plaintiffs dispute), the work of defendants' experts is irrelevant because it refutes a contention that
15 the plaintiffs have never made. Defendants argue that the DDT to PCB ratio can be used to
16 demonstrate that the Palos Verdes shelf sediments are not "the" source of DDT in the birds. Defs.
17 Mem. at 15-16. However, the plaintiffs have never argued that the Palos Verdes shelf sediments are
18 the sole source of DDT to any of the birds. And defendants' own expert has testified that the ratio
19 technique is only valid if there is a single source of contamination.¹⁶ Thus the technique, even if
20 valid, is inapplicable here.

21 In sum, if there is any dispute as to whose DDT caused the bird injuries, it is only because
22 defendants' putative experts have selectively reviewed data and constructed a dubious theory which
23 they refer to as "fingerprinting." As the overwhelming evidence will demonstrate at trial, the finger,

24
25 ¹⁶ For example, Dr. Knezovich was asked at his deposition to explain how the ratio technique
26 could be valid when the DDT to PCB ratio for clapper rails eggs in Mugu Lagoon was 4.84 and the
27 ratio in crabs (a prey item of the clapper rails) was 9.35. Saurenman Dec., Exh. 19 (Knezovich depo
28 at 193-197). Dr Knezovich testified that "[n]umbers do not appear to be consistent, but the
comparison is only valid if the rails exclusively fed on crabs. If they only obtained their source of
DDT and PCB from crabs, that's a fair comparison, but I don't believe that's the case." *Id.* at 197.

1 itself, points to Montrose, and thus, summary judgment cannot be granted here.

2 **II. THERE IS NO BASIS FOR THE COURT TO ENTER JUDGMENT ON THE PALOS**
3 **VERDES SHELF PORTIONS OF THE SECOND CLAIM FOR RELIEF.**

4 Defendants make two arguments with respect to EPA's costs relating to the Palos Verdes
5 shelf. First, that the pilot capping study and the institutional controls are illegal because they cost
6 more than \$2 million. Second, that both projects are unsupportable because the Court has stricken
7 "experts" from the administrative record supporting these actions. Therefore, they assert that they
8 are entitled to summary judgment.

9 A. EPA is Not Seeking to Recover the Costs of the Institutional Controls Program or of
10 the Pilot Capping Study in This Action.

11 The primary defect with the defendants' argument is that EPA does not seek to recover the
12 costs of the institutional controls program or the pilot capping study in this action. As we have stated
13 innumerable times, plaintiffs, on behalf of EPA and DTSC, are only seeking in this case to establish
14 the liability of the defendants under Section 107 of CERCLA, *i.e.*, a declaratory judgment with
15 respect to future costs and recovery of past costs. The costs currently being incurred by EPA to
16 conduct its pilot capping study are not part of the past cost claim which plaintiffs assert here.
17 Further, plaintiffs have not asserted a past cost claim for a cleanup action – institutional controls –
18 which EPA has not even selected as a response action. Thus, the defendants are seeking summary
19 judgment on matters which are not even a part of this case. This is sufficient to deny the motion.

20 B. Institutional Controls have Not been Selected or Performed as a Removal Action.

21 EPA has completed an EE/CA Report summarizing an investigation of the Palos Verdes shelf
22 for a the limited purpose of evaluating the need for and feasibility of response actions that could
23 reduce threats to human health and the environment in the near term. Proposed Plan (Defs. Exh.
24 3) at 4-5.

25 In March 2000, EPA proposed a plan for the use of institutional controls as an interim
26 response to reduce human consumption of contaminated fish from the Palos Verdes Shelf and
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environs,¹⁷ Defs. Exh. 3, and solicited public comments.¹⁸ The proposed plan states that the institutional controls “would be an interim step while EPA continues its investigations of the Palos Verdes shelf. EPA is continuing its evaluation of capping the contaminated sediments and expects to undertake a pilot capping project later in 2000.” Defs. Exh. 3 at 2. “The role of the this proposed action is to reduce the magnitude of the risks to human health presently associated with the site. This would be followed by a continue evaluation of ecological risks and the need for additional response actions at the site.” *Id.* at 5. “It is important to recognize that the alternatives described here and in the EE/CA are being evaluated in the context of taking an interim Superfund action (i.e., EPA is not selecting a final action). As such, even if EPA selects the recommended action there would be a continuing evaluation to assess the need for and feasibility of additional response actions.” *Id.* at 7 (stamped 000022).

However, EPA has simply proposed institutional controls for public comment. EPA has not completed the decision making process and has not selected institutional controls as a response action for the Palos Verdes Shelf. EPA cannot select the institutional controls as a response action until public comment is considered and a written response is prepared and issued. *See* 42 U.S.C. Section 9617(b) and 40 C.F.R. Section 300.415(n)(4)(iv). Thus, defendants’ implication that EPA’s proposal represents a decision to implement institutional controls is wrong. Defs. Mem. at 17. EPA has proposed such response actions. Indeed, the advisory, hypothetical nature of the relief sought by defendants is evidenced by their own description: EPA is “poised” to implement institutional controls. *Id.* Until such a program has been selected, and the costs of the program sought from the defendants, there is nothing upon which the Court can grant the summary judgment sought by the defendants.

¹⁷The proposed institutional controls include public information and outreach programs to warn recreational anglers about the risks of consuming contaminated fish from the Palos Verdes Shelf, as well as an enforcement program to prevent the commercial catch of contaminated White Croaker from the Palos Verdes Shelf.

¹⁸The public comment period closed on May 15, 2000. The Defendants submitted over 100 pages of written comments and seventeen boxes of related materials during the public comment period.

1 Moreover, the Court should reject any argument that summary judgment should be entered
2 because the costs of the final institutional controls program, if selected in the future, might exceed
3 CERCLA's limits on removal actions. Should EPA in the future decide to select a removal action,
4 at that time EPA would need to assess the implications of Section 104(c). EPA explained this very
5 issue in its EE/CA Report, acknowledging that the actions it is considering may well exceed the
6 limits in section 104(c). EE/CA Report, at 23-24.¹⁹ However, EPA also explained that CERCLA
7 and the NCP expressly authorize removal actions to exceed \$2 million dollars in certain
8 circumstances. See 42 U.S.C. § 9604(c)(1); 40 C.F.R. § 300.415(b)(i)-(ii). Until a final action is
9 selected, EPA can not determine whether the Section 104(c) limitations or exceptions apply.²⁰
10 Moreover, if the selected action will be paid for or performed by private parties rather than the
11 Superfund, the limits are not applicable. *Id.* In other words, the 104(c) limit issue exists but is not
12 ripe.

13 C. The Pilot Study is an Investigation Which is not Subject to Limitations on Removal
14 Actions.

15 CERCLA expressly authorizes EPA to undertake any investigations, monitoring, surveys,
16 testing as necessary to identify releases and the extent of danger, and may undertake planning,
17 engineering, and other studies as necessary to plan response actions. 42 U.S.C. § 9604(b). In crafting
18 the CERCLA Section 104(c)(1) limits on removal actions, Congress expressly excluded
19 investigations and other activities conducted under Section 104(b) from the limits on removal actions
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21
22

23 ¹⁹ Exhibit 34 to Declaration of Paul Singarella in Support of Defendants' Opposition to U.S.
24 Motion to Vacate Order to EPA, filed April 27, 1200 (Docket # 1942) ("Singarella Dec.").

25 ²⁰ The circumstances at the time EPA makes a decision to select a removal action determine
26 whether the 104(c) limits are at issue. For example, if the appeals process with respect to the three
27 prior consent decrees concluded in EPA's favor, a decision to select institutional controls could
28 properly presume that the \$30 million in settlement funds that EPA would receive under those
settlements would be used to fund implementation of the institutional controls program. In such
circumstances, the 104(c) limits would not apply because 104(c) only limits continued expenditures
from the Superfund. 42 U.S.C. § 9604(c)(1).

1 established in 104(c)(1).²¹ The defendants have expressly recognized this, stating that the limitation
2 applies only to response actions "other than investigative and monitoring activities." Defs. Mem.
3 at 18, quoting *Montrose v. EPA*, 132 F. 3d at 92, n.3. That is all that EPA has done so far regarding
4 the Palos Verdes shelf. EPA fully complied with all NCP requirements for commencing a removal
5 investigation pursuant to section 104(b). After months of carefully reviewing available information,
6 EPA prepared and issued an EE/CA approval memorandum discussing in extensive detail the factual
7 basis for the findings made.²²

8 Moreover, the pilot capping study is clearly an "investigation" envisioned by Section 104(b)
9 of CERCLA.²³ The current schedule for the pilot study includes bottom current measurements,
10 plume tracking, sediment profiles, sonar, video, geotechnical and chemical analyses, evaluation of
11 data and reports, all of which are obviously for investigation, not for clean up. See Operations and
12 Monitoring Plan for the pilot project, Defs. Exh 14. The pilot project covers only 180 acres, as
13 compared to the 7.6 square kilometer cap described in the EE/CA. In fact, the pilot project
14 investigation is not an especially expensive response investigation. For example, Defendants
15 themselves have spent over \$21 million investigating the on-shore contamination.

16 As explained by the very deposition testimony attached as Defs' Exh. 13, the pilot capping
17 is not limited to \$2 million "Because it is part of a study." Defs' Exh. 13 at 54. Defendants' only
18 argument on this point is that calling the pilot study an investigation rather than a removal action is

19
20 ²¹ 42 U.S. C. Section 9604(c)(1) ("obligations from the Fund, other than those authorized
21 by subsection (b) of this section, shall not continue after \$2,000,000 has been obligated for response
actions. . . .")

22 ²² The EE/CA approval memorandum can be found as Exhibit 6 to the Singarella
23 Declaration. Attached to the EE/CA Approval Memorandum was a list of numerous documents that
24 EPA had considered in making its decision to begin a removal investigation. EPA also determined
25 that the NCP criteria for commencement of a removal action (40 C.F.R. section 300.415 (b)(1-2) had
26 been met, stating "the DDT and PCB contamination of the sediments at Palos Verdes have caused
and continue to cause an ongoing release to the food chain and pose threats to human health and the
environment." EE/CA Approval Memorandum (Singarella Dec., Exh. 6) at 17-18.

27 ²³ EPA's March 2000 Proposed Plan explained that EPA is continuing its investigation of
28 capping the contaminated sediments with the next significant step being the Pilot Cap Placement
project. Proposed Plan at 2.

1 "semantic." Defs. Mem. at 20. However, as shown by the Operations and Monitoring Plan for the
2 pilot project, the project is a study.

3 The Operations and Monitoring Plan for the pilot study clearly shows that this activity is a
4 study, and not a remedial action. Defs. Exh 14. The "Background" section states,

5 [EPA] is continuing its investigation regarding the feasibility of in-situ capping all or a
6 portion of the . . . contaminated sediments on the Palos Verdes shelf. . . . EPA Region 9 has
7 entered into an interagency agreement with USACE . . . [for] tasks related to Pre-Design Data
8 Collection & Studies. One aspect of the pre-design studies is a field pilot study of cap
9 placement on the shelf.

10 Defs. Exh 14 at 1. The monitoring requirements for the pilot study are intended to answer the
11 following "key questions": 1) Does placement occur as modeled?; 2) Can a uniform cap be
12 constructed?; 3) Can disturbance to in-place sediments be kept within tolerable limits?; 4) Does the
13 cap remain clean?; and 5) Does the cap remain stable during placement? Defs. Exh 14 at 10-11; *see*
14 *id.* at 2 (study objectives relate to similar issues).

15 Indeed, the pilot study is intended to answer the very question posed by EPA's peer reviewer
16 of the modeling work. *See* Defs. Mem. at 21, n. 25 (quoting peer reviewer as stating that there are
17 large "risks associated with using modeling results as a basis for the cap design."). Defendants argue
18 that performing the pilot study is "misconduct" in light of the peer reviewer comments; to the
19 contrary, it is rather prudent to undertake a pilot study in order to answer such questions.

20 D. The Court Should Deny Defendants' Argument Based on the Eviscerated
21 Administrative Record File.

22 The Court has already issued harsh sanctions against the plaintiffs for alleged misconduct.
23 The Court's order of July 5, 2000 strikes certain "experts" and precludes recovery of the costs
24 incurred in connection with those experts. So far, those costs have amounted to well over \$15
25 million.

26 But that has not been enough to slake the defendants' thirst for sanctions. Defendants argue
27 that the Court, having stricken expert witnesses, and having precluded recovery of EPA's costs for
28 the TAC and for certain experts, must now enter summary judgment that EPA cannot recover costs

1 of any response actions. In fact, defendants had asked the Court to dismiss this case with prejudice,
2 and the Court did not grant that sanction. Now they have returned to the Court to ask for summary
3 judgment on precisely the same grounds. The Court should deny that request again. }

4 Moreover, the Court's order on sanctions struck expert witnesses from testifying at the trial.
5 The Court's order did not state that EPA or any other agency was prohibited from relying on these
6 consultants for any purpose in any administrative process.²⁴ The Court did not state that EPA was
7 prohibited from ever replacing or supplementing the work of these consultants in its administrative
8 process.²⁵

9 In fact, the Court issued as a sanction "supplementation of the record of all EPA response
10 activities with respect to Palos Verdes shelf." July 5 Order. Yet under the Defendants' misguided
11 view, summary judgment must be entered because the Court's order makes it impossible to have a
12 legally sufficient administrative record. The Defendants' argument and the Court's order requiring
13 supplementation are inherently inconsistent.

14 Finally, the United States respectfully submits that the Court lacks jurisdiction to strike
15 EPA's administrative record file.²⁶ The United States has argued this issue in several prior briefs,
16 and has filed an appeal based on this issue, and will not burden the Court by reiterating those
17 arguments here. Suffice to say that 42 U.S.C. § 9613(h) and (j) bar this Court from removing the
18 contents of the administrative record.

19 To avoid this jurisdictional bar, defendants have concocted the theory that EPA loses the
20 ability to exercise its congressionally mandated authority under section 104 of CERCLA to respond
21 to hazardous substances if any trustee of natural resources – apparently including state agencies –

22
23 ²⁴ Plaintiffs continue to disagree with the defendants and the Court that the EPA consultants
stricken by the Court's sanction order can be properly characterized as "expert witnesses."

24
25 ²⁵ Indeed, such an interpretation of the Court's order could permanently extinguish EPA's
26 ability to ever take any action to control human and environmental exposure to DDT from the Palos
Verdes shelf. •

27 ²⁶ There is no final administrative record for any Palos Verdes shelf clean up action, because
28 no response actions have been selected. The administrative record file will be final only after EPA
selects a final response action.

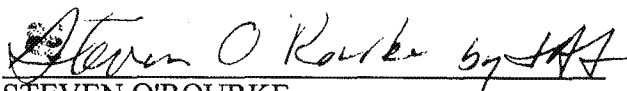
1 brings a claim for damages. Defs. Mem. at 22. Thus, according to defendants, should the Trustees
2 decline to pursue a claim for restoration of the sediments (as they have done), all other authorities
3 under CERCLA evaporate. This is obviously contrary to CERCLA. Given their prior concession
4 to the D.C. Circuit that EPA's conduct of response activities on the Palos Verdes shelf was
5 unobjectionable, this farfetched argument must be rejected. *See Montrose Chemical Corp. v. EPA*,
6 *supra*.²⁷

7 As stated, EPA has not selected any response actions for the Palos Verdes shelf but has only
8 proposed institutional controls. Nor has EPA sought to recover its costs associated with the proposal.
9 The Defendants ask the Court to take jurisdiction over this work-in-progress, assume EPA's
10 administrative role, and determine whether the technical evidence currently contained in the
11 administrative record file is sufficient to support the selection of any cleanup action for the Palos
12 Verdes shelf. *See* Defs. Mem. at 21, and n. 25. The Court should decline to insert itself into these
13 non-final and ongoing proceedings. The Court should not provide the defendants with the advisory
14 ruling which they seek.


15 Dated: August 21, 2000.

Respectfully submitted,

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18 Environment & Natural Resources Division
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²⁷ Indeed, by arguing this theory, Defendants appear to acknowledge that the Court has no jurisdiction to consider EPA's future actions at the Palos Verdes shelf. *Id.*

DECLARATION OF SERVICE BY MAIL

Re: UNITED STATES and STATE OF CALIFORNIA v. MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, et al., U.S.D.C., C.D. CAL. No. CV 90-3122-R

I, John A. Saurenman, declare that I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013; I served a copy of the attached

OPPOSITION OF PLAINTIFFS UNITED STATES AND STATE OF CALIFORNIA TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT I AND PORTIONS OF COUNT II RELATING TO THE PALOS VERDES SHELF

on each of the following, by placing same in an envelope(s) addressed as follows:

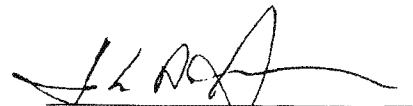
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Each said envelope was then, on August 21, 2000, sealed and deposited in United Parcel Service Overnight Delivery with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct, and is executed on August 21, 2000, at Los Angeles, California.


Declarant